No. 82-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MONSANTO COMPANY,

Petitioner,

vs.

SPRAY-RITE SERVICE CORPORATION,

Respondent.

On Petition For a Writ of Certiorari To The
United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION

FRED H. BARTLIT, JR.
(Counsel of Record)
JEFFREY J. KENNEDY
MICHAEL P. FORADAS

KIRKLAND & ELLIS
200 East Randolph Street
Chicago, Illinois 60601
(312) 861-2000

Of Counsel:
RICHARD W. DUESENBERG
WILLIAM F. ROGERS

MONSANTO COMPANY
800 N. Lindberg Blvd.
St. Louis, Missouri 63166

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CHAS. P. YOUNG CHICAGO, INC.

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REPLY BRIEF IN SUPPORT OF PETITION[1]

The amicus brief filed by the Solicitor General in support of Monsanto's petition confirms the importance of the two antitrust issues presented by the petition. As the Solicitor General states, the Seventh Circuit's decision condemning Monsanto's non-price practices as *per se* unlawful "undermines the distinction made in *Sylvania* between price and non-price vertical restrictions and threatens to stifle many types of procompetitive non-price actions taken by manufacturers in order to stimulate interbrand competition." (Amicus Brief at 10-11.)

[1]The statement of Parties to the Proceedings pursuant to Supreme Court Rule 28 appears at page ii of the petition. There have been no changes to the parties in the interim.

Likewise, as the Solicitor General states, "[t]he decision below conflicts with decisions of four other courts of appeals. . . ." on whether a vertical price-fixing conspiracy can be inferred solely from evidence of price complaints and termination. (*Id.* at 5.) Its effect "is to undermine Section 1's crucial distinction between collective and unilateral conduct . . . and the rule below would significantly impede independent, procompetitive conduct."[2] (*Ia.* at 7.)

Respondent's brief does not address the questions presented by the petition and joined in by the Solicitor General: whether the Seventh Circuit applied two incorrect *per se* standards in sustaining the jury verdict. Respondent neither defends the standards applied by the court of appeals nor denies the direct conflict in the circuits on the conspiracy rule. It thus begs the questions presented for review and ignores the serious implications of the Seventh Circuit's decision for antitrust policy and its chilling effect on procompetitive business conduct.[3]

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[2] The importance of the second issue is further demonstrated by the filing of at least four other petitions for certiorari raising that issue this Term. *See H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), *cert. denied*, ___ U.S. ___, 103 S. Ct. 176 (1982); *Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3362 (U.S. Nov. 9, 1982), *petition for reh'g filed*, Jan. 3, 1983; *Venture Technology, Inc.* v. *National Fuel Gas Distribution Corp.*, 685 F.2d 41 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3362 (U.S. Nov. 9, 1982), *petition for reh'g filed*, Dec. 3, 1982; *Davis-Watkins Co.* v. *Service Merchandise*, 686 F.2d 1190 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3421 (U.S. Nov. 19, 1982). This conflict is ripe for review.

[3] A substantial portion of respondent's brief is devoted to the post-termination boycott claim, which Monsanto has not raised in this Court. Respondent does not contend that this claim, standing alone, is sufficient to sustain the jury's verdict or the damage award. It cannot so argue because its theories of both antitrust injury and damages were predicated upon the combined effect of its termination, Monsanto's non-price programs and policies and the alleged group boycott. Because of its

(footnote continued on next page)

POINT I: Contrary to *Sylvania*, the Seventh Circuit applied a per se rule to Monsanto's non-price practices based on a mere allegation, not proof, of a linkage to price-fixing.

The Seventh Circuit squarely held that *Sylvania*[4] "applies only if there is no allegation that the territorial restrictions are part of a conspiracy to fix prices," and that "*Sealy* and its progeny prescribe the per se rule" when such an allegation is made. (App. A-12.) As the Solicitor General notes, "the court of appeals' analysis, on its stated terms, found the allegation itself to be dispositive. Thus, the court expressly linked the invocation of a per se approach to respondent's allegations and not to the proof adduced at trial." (Amicus Brief at 10-11 n.15)(citations omitted).

Respondent does not defend that standard, endeavoring instead to rewrite the decision to include a requirement, not expressed by the court of appeals, that there be sufficient evidence to justify submitting the issue to the jury. The court intended no such requirement, as is confirmed by its failure to analyze whether there was any evidence linking Monsanto's non-price practices to the alleged price-fixing.[5]

(footnote continued from preceding page)

aggregate damage theory and the nature of its damage evidence, *see* Pet. at 3 n.4, 10 n.8; Amicus Brief at 5 n.5, a reversal on either of the issues presented for review would require a new trial.

[4] *Continental T.V., Inc.* v. *GTE Sylvania* Inc., 433 U.S. 36 (1977).

[5] Respondent's comment that Monsanto waived objection to the jury instruction on this issue misses the point. Monsanto does not challenge the correctness of the instruction. Rather, Monsanto's position at trial, on appeal and in its petition has been that it was entitled to a directed verdict based on the lack of evidence linking the non-price practices to the alleged price-fixing conspiracy. Monsanto thus does not disagree with the cases cited in respondent's brief at 16-17 (hereinafter "Resp. Brief"), all of which require such evidence of linkage before a *per se* rule may be applied.

The court of appeals declined to consider that issue and did not sustain the verdict on that ground.

Even were the decision to be read as respondent suggests, the record contains no evidence that would have permitted the jury to link the non-price programs to alleged price-fixing. Respondent presented no evidence at trial explaining how Monsanto's practices (including compensation payments to distributors for technical education and promoting sales to dealers) supported, or could have any rational connection to, resale price maintenance. (Pet. at 17-19.)

The sole evidence cited by respondent as establishing the essential link is testimony purporting to show that Monsanto's assignment of distributors to areas of primary responsibility tended to limit competition, including price competition, among distributors. This sort of indirect effect on price competition does not constitute unlawful price-fixing. As this Court recognized in *Sylvania*, non-price vertical restrictions may well have such an indirect effect on the level of intrabrand price competition, *see* 433 U.S. at 54, but are not therefore condemned under a *per se* rule. *Cf. Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9, 23 (1979). The argument that an indirect effect on price establishes a link to price-fixing is particularly fallacious in this case because Monsanto assigned 10 to 20 distributors to each area of primary responsibility.[6]

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[6] Respondent has not disputed that Monsanto distributors sold substantial amounts of Monsanto's product outside their primary areas. (Pet. at 18.) Notwithstanding respondent's present position (Resp. Brief at 25 n.16), respondent's owner testified at trial that there was always vigorous competition (Tr. 1182-85; *see also* Tr. 692-93, 1179, 1323), and its economic expert agreed that the industry "was a highly competitive industry" (Tr. 2990).

POINT II: Respondent does not dispute the "unmistakable" conflict created by the Seventh Circuit's decision on the conspiracy standard.

The second issue presented by the petition is whether the conspiracy rule applied by the Seventh Circuit, which conflicts with the standard adopted by other circuits, is correct. The Seventh Circuit held that respondent proved a *per se* unlawful price-fixing conspiracy based solely on evidence that Monsanto, concerned about its distributors' resale prices, received price complaints from other distributors and later declined to renew respondent. (App. A-15 to 16.) In so holding, the court created an "unmistakable", continuing conflict among the circuits.[7]

Respondent does not attempt to analyze this conflict, nor does it defend the Seventh Circuit's divergent legal standard. It thus ignores the question presented for review by Monsanto and the Solicitor General. Instead, respondent's brief is devoted to a lengthy discussion of evidence, important elements of which were ruled inadmissible.[8] Most of the admissible evidence relates to price complaints and price concern, which other courts of appeals have held inadequate to prove a conspiracy.

The remainder of the evidence recited by respondent relates to an alleged post-termination boycott and is beside the point. First, the court of appeals' conspiracy holding was based solely on evidence of price complaints, price concern and subsequent non-renewal. Second, as a matter of law, this boycott evidence is not probative of an earlier non-renewal pursuant to an alleged price-fixing conspiracy.

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[7] *Schwimmer* v. *Sony Corp. of America*, 51 U.S.L.W. 3362 (U.S. Nov. 9, 1982), *petition for reh'g filed*, Jan. 3, 1983 (White J., citing *Spray-Rite Service Corp.* v. *Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982), in dissenting from denial of certiorari).

[8] *Compare* Resp. Brief discussing Laverty testimony at 2 n.2 *with* App. A-28; *compare* Resp. Brief discussing Yapp testimony at 9 *with* Tr. 772, 1295.

Respondent's brief emphasizes the evidence relating to its price-cutting, the frequent complaints to Monsanto concerning that price-cutting, and Monsanto's concern about resale prices. (Resp. Brief at 5-6.) As the petition demonstrates, such complaints and price concerns are competitive facts of life. They are no more probative of conspiracy than of lawful unilateral conduct based upon legitimate economic self-interest. (Pet. at 22-26.)[9] Respondent does not dispute that it had a long history as a price-cutter, that after the last complaint (fifteen months prior to non-renewal) respondent's distributorship was renewed, and that it subsequently failed to satisfy Monsanto's newly-announced renewal criteria. Nor does it dispute that neither it nor any other distributor ever acquiesced in Monsanto's suggestions regarding resale prices, notwithstanding any alleged termination threats by Monsanto. (Resp. Brief at 7, 8, 21 n.14.)

Lacking evidence that Monsanto did not act unilaterally, respondent recites evidence of the alleged subsequent post-termination boycott. Notwithstanding respondent's speculation to the contrary, such evidence is not probative of non-renewal pursuant to a price-fixing conspiracy. *Bruce Drug, Inc.* v. *Hollister, Inc.*, 688 F.2d 853, 857 (1st Cir. 1982) (evidence of "subsequent enforced prevention of [plaintiff's] purchasing defendant's goods from other dealers" amounting to a group boycott after termination does not support a

[9] Respondent implies that a telephone call between it and Monsanto some six months before termination suggests that the call must have been motivated by price complaints. (Resp. Brief at 8.) The fact that the call occurred nine months after the last complaint negates any inference that the call was motivated by a complaint. Other claimed conspiracy evidence is of a like vein. For example, respondent observes that Monsanto employees, both in the home office and in the field, were aware of its price-cutting, that Monsanto made inquiries about resale prices, and that it was concerned about resale price levels in the marketplace. (Resp. Brief at 5 n.4, 9 n.5, 22 n.15.) This evidence shows only a manufacturer's normal interest in resale prices.

"finding of a concerted termination of [plaintiff's] dealership . . . ."). Moreover, the conspiracy rule applied by the Seventh Circuit, which focuses purely on the events leading up to termination, does not encompass such evidence. And while respondent argues that the boycott verdict distinguishes this case from those decisions in conflict with the Seventh Circuit, it never explains how the evidence of a later boycott is probative of an earlier price-fixing conspiracy. Respondent tried the case and the Seventh Circuit reviewed it on the theory that the termination was the product of a conspiracy, not the beginning of one.

CONCLUSION

The Seventh Circuit's decision "threatens to chill the efforts of manufacturers to implement numerous procompetitive vertical marketing decisions that, under *Sylvania*, should be entitled to rule of reason analysis instead of per se condemnation." (Amicus Brief at 13.) Similarly, "in practical effect, the Seventh Circuit's [conspiracy] rule could virtually immunize dealers from termination once a competitor has complained." (*Id.* at 9.)

If permitted to stand, the decision below will deter any manufacturer from implementing procompetitive marketing strategies requiring promotional activities by distributors. This case illustrates that risk. Here, a toehold supplier, confronted by an entrenched, dominant competitor adopted innovative marketing programs which the Solicitor General describes as "precisely the type of practices identified in *Sylvania* as likely to have procompetitive effects. . . ." (Amicus Brief at 12.) These programs were successful, and the market became less concentrated. Nevertheless, a distributor who refused to follow Monsanto's marketing programs and was not renewed was awarded over $10 million in damages based on the illegality of these demonstrably procompetitive programs.

This case presents the Court with an appropriate opportunity to define proper legal standards on two clearly-presented issues of antitrust law and thereby foster the use of innovative non-price programs enhancing competition. We respectfully submit that the petition should be granted.

FRED H. BARTLIT, JR.
(Counsel of Record)
JEFFREY J. KENNEDY
MICHAEL P. FORADAS

KIRKLAND & ELLIS
200 East Randolph Street
Chicago, Illinois 60601
(312) 861-2000

Of Counsel:
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